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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF COLORADO,

Petitioners,

v.

ROBERT CHAVEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

AMICUS CURIAE BRIEF OF THE DISTRICT ATTORNEY IN AND FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO IN SUPPORT OF THE PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO, Petitioners, vs. ROBERT CHAVEZ, Respondent.	AMICUS CURIAE BRIEF OF THE DISTRICT ATTORNEY IN AND FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO

QUESTION PRESENTED FOR REVIEW

Is a criminal defendant's privilege to testify in his own behalf impermissibly burdened by the Colorado statutory procedure that allows the jury to use the defendant's admissions of prior convictions at trial as evidence in aid of proof of the habitual counts in a subsequent, bifurcated hearing on enhanced punishment?

EXEMPTION FROM CONSENT TO FILING AMICUS CURIAE BRIEF

This brief of amicus curiae is sponsored by the District Attorney as the authorized law officer of the City and County of Denver. According to Rule 36.4, consent to filing this brief of amicus curiae is not required because

the City and County of Denver is a political subdivision of the State of Colorado.

INTEREST OF AMICUS CURIAE

1) The City and County of Denver, which comprises the Second Judicial District, filed 2,428 felony cases in 1979 and 2,793 felony cases in 1980. Although Colorado has 22 judicial districts, Denver's felony filings were 19 percent of all felony filings in Colorado for both 1979 and 1980.

2) Amicus curiae, as District Attorney for the City and County of Denver, often seeks to enhance penalties by filing habitual criminal charges because: (i) many of the persons charged with crimes in Denver are recidivists of violent crimes; and, (ii) Colorado's statutory presumptive range of sentences for felonies is among the lowest in the nation. For example, the range for second-degree murder and for first-degree sexual assault (forcible rape) is 8-12 years and for

aggravated robbery 4-8 years, plus one year of parole for each sentence. These sentences are subject to automatic 50 percent credit for good time and 15 days' additional credit for each 6 months earned good time, which are not subject to divestment once accrued.

Thus, the Colorado Supreme Court's ruling, characterized in the dissenting opinion of its Chief Justice as ". . . a new and novel rule of law . . . that the prosecution must, in effect, re-prove the fact already admitted,", has substantial and adverse effect upon the felony prosecutions that are the responsibility of amicus.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3). The time factors upon which the jurisdiction rests are met by the Attorney General of the State of Colorado having filed his petition for certiorari within 60 days of the Colorado Supreme Court's denial on January 26, 1981 of

the People's petition for rehearing, Rule 20, and this brief of amicus curiae being filed within the allowable time limit, Rule 36.

SUMMARIES OF COLORADO SUPREME COURT OPINION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, AND STATEMENT OF THE CASE

Although not required by Rule 36.5, amicus curiae includes the following for convenient reference and to facilitate consideration of the argument presented.

Opinion Below. The opinion of the Colorado Supreme Court in the captioned cause is included as Appendix A-1 to the Colorado Attorney General's petition for certiorari. The opinion was announced by a 4-3 majority, with two dissenting opinions, each concurred in by a third justice.

The majority opinion held, based upon Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), that the joint effect of the following Colorado statutory procedures "create an intolerable tension between two constitutional rights":

The Colorado witness statute which provides that a defendant who elects to testify in his own behalf in a criminal case may be impeached by evidence of his prior felony convictions; and,

The Colorado habitual criminal statute which provides that the defendant's impeachment evidence based upon his prior felony convictions may be considered by the jury in aid of proof of the habitual criminal counts in the subsequent, bifurcated sentence-enhancement proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition for certiorari sets forth verbatim in its text and Appendices A-2 and A-3 the constitutional and statutory provisions involved in this case, which are:

The Fifth and the Fourteenth Amendments to the federal constitution.

The Colorado habitual criminal act, §§16-13-101, 16-13-102, and 16-13-103, Colorado Revised Statutes 1973.

The Colorado witness statute, §13-90-101, Colorado Revised Statutes 1973.

The authorized abbreviation for Colorado Revised Statutes 1973 will be used in the ensuing brief, "C.R.S. 1973."

STATEMENT OF THE CASE

The undisputed facts here pertinent appear in the dissenting opinion of Lee, J. (pp. 1, 2, and 4):

At the conclusion of the prosecution's evidence, the trial court advised the defendant that it would bifurcate the trial of the habitual criminal charges from the trial of the substantive offense. The court further advised the defendant that if he took the stand to testify in his own behalf, evidence of his prior convictions would be admissible for impeachment purposes only during the substantive trial.

Following the court's advisement and after consulting with his counsel, the defendant stated that he understood the consequences of his testifying and that he elected not to testify in his own defense.

If the defendant had elected to testify, Colorado statute would have allowed the impeachment evidence based upon his prior felony convictions to have been used in aid of proof of the habitual criminal count in the sentence-enhancement proceedings.

SUMMARY OF ARGUMENT

I. The defendant was not unconstitutionally deprived of taking the witness stand in his own defense for these reasons:

a. Although Colorado statute allows a defendant who elects to testify to be impeached by evidence of his prior felony convictions, the privilege of the defendant to testify in his own defense does not include the right to commit perjury.

b. The defendant's right to testify was not impermissibly "chilled" by reason of Colorado's statutory procedure allowing the jury, if a verdict of guilty on the substantive charge be returned, then to consider the defendant's sworn admissions

of his prior conviction as aid in proof thereof for sentence enhancement. Testimony under oath is not mere ritual. A fortiori "chill" is absent, because only after the jury returns a guilty verdict is that jury first apprised of the issues relating to the habitual criminal charges.

II. In holding that, according to Simmons v. United States, 390 U.S. 377, the defendant was denied due process under the Colorado statutory procedure here involved on the ground that the procedure "creates an intolerable tension between two constitutional rights," the Colorado Supreme Court has misconceived and misapplied federal constitutional law for the following reasons:

a. In Simmons, supra, the tension created was between two constitutional rights involved at a critical stage of the substantive case. Here, the concern

is the use, after a guilty verdict, of evidence lawfully admitted for impeachment purposes at the guilt trial as proof in aid of prior convictions in the subsequent sentence enhancement proceedings. (Dissenting opinion, Lee, J., at p. 5.)

b. In McGautha v. California, 402 U.S. 183 (1971), this Court declared that, to the extent that the Simmons rationale was based on a "tension" between constitutional rights and their underlying policies, "the validity of that reasoning must now be regarded as open to question. . . " (p. 212.

c. Simmons surely cannot be given the broad thrust which the Colorado Supreme Court has attributed to it, i.e., that in post-conviction proceedings relating to sentence enhancement, the use of the defendant's own testimony under oath as to his prior convictions creates a constitutionally "intolerable tension" depriving defendant of his right to testify on his

own behalf. The prosecuting attorney, by express statutory provision, retains the burden of proving beyond a reasonable doubt that the defendant has been previously convicted of felonies as charged. §16-13-103(4)(b), C.R.S. 1973.

d. In sum, the defendant is not deprived of any constitutional right if he deems himself "chilled" from testifying falsely. If he testifies truthfully at his trial on the substantive offense, surely the jury -- if a guilty verdict be returned -- is entitled to consider the defendant's previous sworn testimony admitting his prior felony convictions as aid in proof of the fact of those convictions. The contrary holding of the Colorado Supreme Court derogates the oath, which is the basis for integrity of testimony, into a mere ritual.

III. Amicus curiae adopts and submits the following summary from the dissenting opinion of Hodges, C.J. (at p. 5):

> "The majority opinion in effect is advancing a new and novel rule of law that a judicial admission by a defendant that he has been previously convicted cannot be considered as proof of that fact by the jury before whom the issue is being tried; and that the prosecution must, in effect, re-prove the fact already admitted. In my view, this requirement is without reason, logic, or judicial precedent, and serves no valid procedural purpose."

ARGUMENT

I. THE RESPONDENT DEFENDANT WAS NOT UNCONSTITUTIONALLY DEPRIVED OF HIS PRIVILEGE TO TESTIFY IN HIS OWN DEFENSE BY REASON OF THE PROCEDURE ALLOWING HIS CREDIBILITY TO BE IMPEACHED AT HIS SUBSTANTIVE TRIAL BY EVIDENCE OF HIS PRIOR FELONY CONVICTIONS, AND, IF A GUILTY VERDICT WERE RETURNED, HIS ADMISSIONS UNDER OATH TO BE CONSIDERED BY THE SAME JURY AS AID IN PROOF OF THOSE CONVICTIONS IN THE SUBSEQUENT SENTENCE ENHANCEMENT PROCEEDINGS.

Colorado statute permits a defendant who takes the stand in his own behalf to be subject to impeachment of his credibility by his prior felony convictions. Colorado statute also provides that the defendant's sworn testimony as to his prior convictions, after a guilty verdict, is

admissible substantive evidence before the same jury at a subsequent, birfurcated sentence enhancement proceeding. Amicus curiae contends that the majority opinion conflicts with federal constitutional law in holding that the combined effect of these statutes "creates an intolerable tension between two constitutional rights."

The Colorado witness statute, §13-90-101, C.R.S. 1973, which provides that the defendant in a criminal case who takes the witness stand in his own defense may be impeached by evidence of his prior felony convictions, has been repeatedly upheld as constitutional by the Colorado Supreme Court. E.g., People v. Henry, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S.Ct. 445, 58 L.Ed.2d 419 (1978) and People v. Montez, ___ Colo. ___, 589 P.2d 1368 (1979).

The pertinent provisions of the Colorado habitual criminal statutes provide that:

(1) An information or indictment seeking

increased penalties shall identify by separate count each alleged former conviction. §16-13-103 (2), C.R.S. 1973.

(2) If the defendant denies at arraignment that he has been previously convicted of the crimes identified or stands mute, the jury impaneled to try the substantive offense shall determine by separate verdict whether the defendant has been convicted as alleged, §16-13-103(3) and (4), C.R.S. 1973.

(3) Only after the jury has returned a verdict of guilty of the substantive offense does the jury consider the issues of the defendant's prior convictions, and "The prosecuting attorney has the burden of proving beyond a reasonable doubt that the defendant has been convicted as charged." §16-13-103(4)(b), C.R.S. 1973.

(4) If the defendant testifies in his own defense at the trial on the substantive offense and denies that he has been previously convicted, "the defendant, and the prosecuting

attorney on rebuttal, shall present all evidence relevant to the issues of previous convictions," and if the defendant be found guilty of the substantive offense, then "the jury shall return verdicts on all issues relating to previous convictions." §16-13-103(5), C.R.S. 1973.

In this case, after the trial court had explained the statutory procedures to the defendant and after defendant had consulted with his counsel, the defendant elected not to testify at his trial on the substantive offense. The jury convicted defendant of the substantive offense. Noted in passim is that the trial court granted the defendant's motion for judgment of acquittal on the four counts of prior felony convictions.

The 4-3 majority opinion of the Colorado Supreme Court has reversed the defendant's conviction on the substantive charge because it found "an intolerable tension between two constitutional rights," i.e., the defendant's privilege to testify in his own behalf at his trial on

the substantive offense and his due process right to have the State prove beyond a reasonable doubt the habitual criminal counts. Amicus curiae respectfully avers that the holding of the majority opinion is inconsistent with federal constitutional law, for the following reasons:

First, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. Chaffin v. Stynchcombe, 412 U.S. 17, 30, 93 S.Ct. 1977, 1984, 36 L.Ed.2d 714 (1973).'" Jenkins v. Anderson, ___ U.S. ___, 100 S.Ct. 2124, 2128.

Second, the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." Jenkins v. Anderson, supra, 100 S.Ct. at 2128; Chaffin v. Stynchcombe, 412 U.S., at 32; Crampton v. Ohio, 402 U.S. 183, 213, 91 S.Ct. 1454, 1470, 28 L.Ed.2d 711 (1971).

In the case at bar, the defendant was privileged to testify in his own defense, "but

that privilege cannot be construed to include the right to commit perjury." Harris v. New York, 401 U.S. 222, 225, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971), and quoted with approval in Jenkins v. Anderson, supra, at p. 2129.

In United States v. Grayson, 438 U.S. 41, 54, 98 S.Ct. 2610, 2617, 57 L.Ed.2d 582 (1978), this court declared:

> The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath -- unless we are to say that the oath is mere ritual without meaning.

Grayson supports this view of the right involved by reference to perjury statutes which constitutionally punish those willfully giving false testimony and to the principle that counsel cannot ethically assist his client in presenting what the attorney has reason to believe is false testimony. United States v. Grayson, supra, 438 U.S., at 54, 98 S.Ct,. at 2617.

Thus, if the defendant here had elected to take the stand, his obligation would have been

to testify truthfully, including admission of any prior felony convictions that he had sustained, i.e., a policy of truthful testimony.

If the defendant had elected to take the stand and had admitted his prior felony convictions, those admissions would have been admitted solely for the purpose of impeachment of his credibility. But, the admissions would have been made under oath. Amicus curiae respectfully asserts that the reasoning of the majority opinion is faulty in these respects:

(1) The oath for testimony is not severable: it imposes the duty of truth on all testimony, whether elicited for impeachment purposes or as substantive evidence.

(2) If the defendant had testified at his trial on the substantive offense and had admitted to prior felony convictions, then his admissions would have remained covered by his oath at the post-verdict stage. Certainly the jury could properly consider the defendant's sworn admissions as proof in aid of the fact

of those convictions.

(3) The defendant must choose whether to expose his prior felony convictions by taking the stand in his own defense. But as Lee, J. pointed out in his dissenting opinion (p. 3):

> This hard decision is created by his [the defendant's] own prior criminal conduct since under the long-established rule of evidence prior criminal convictions are held to bear upon the credibility of the witness.

Every defendant in a criminal proceeding is faced with this choice, but a hard decision should not be equated with constitutionally "intolerable tension."

Amicus curiae submits that the reasoning of the majority opinion carries mischievous seeds. The implicit potential of the opinion is that an "intolerable tension" arises between defendant's privilege to testify on his own behalf and his credibility being subject to impeachment by evidence of his prior felony convictions. This is patently contrary to long-settled federal and Colorado constitutional law.

The mischief is further evinced by the procedural results of the opinion, as shown by the following hypothesis: the jury at the trial of the substantive offense heard the defendant give testimony under oath that he has prior felony convictions; the jury thereafter returned a guilty verdict; and, the defendant had habitual criminal counts to be proved at the post-verdict sentence enhancement proceeding. The effect of the Colorado Supreme Court's opinion would be to require that the trial court instruct the same jury that it could not consider the defendant's previous sworn trial testimony as aid in evidence of the convictions. Such a fracturing of sworn testimony finds no precedent in federal or Colorado constitutional law.

II. THE COLORADO SUPREME COURT'S MAJORITY OPINION MISCONCEIVED AND MISAPPLIED FEDERAL CONSTITUTIONAL LAW IN HOLDING THAT, BASED UPON THE "TENSION" RATIONALE OF SIMMONS, SUPRA, THE COLORADO STATUTORY PROCEDURE HERE INVOLVED IS UNCONSTITUTIONAL.

Amicus curiae asserts that the Colorado Supreme Court's majority opinion creates a new and expanded dimension to the "tension" rationale of Simmons, supra. In McGautha v. California, 432 U.S. 183, 213, 91 S.Ct. 1454, 1470, 28 L.Ed. 2d 711 (1971), this Court declared:

> While we have no occasion to question the soundness of the result in Simmons and do not do so, to the extent that its rationale was based on a "tension" between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question. . .

Even if the "intolerable tension" doctrine of Simmons, supra, still had this court's full acceptance, the doctrine should not apply to this case.

In Simmons, the tension created was related to two constitutional rights involved at a critical stage of the substantive case. Here, we do not have that situation. The case at bar involves the use of the defendant's sworn testimony of prior felony convictions being lawfully admitted for impeachment at the substantive trial vis-a-vis use of that testimony as substantive evidence at the post-conviction sentence enhancement proceeding. The defendant claimed that this procedure gave him a Hobson's choice between constitutional rights, and the Colorado Supreme Court's majority opinion agreed. Amicus curiae avers that the use of the defendant's sworn testimony as to his prior felony convictions creates no constitutionally "intolerable tesnion."

In view of McGautha, supra, and the Colorado statutory procedure here under scrutiny, amicus curiae submits that the Colorado Supreme Court's majority opinion contravenes this rule:

> "For it is clear that 'a State may not impose . . . greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.' Oregon v. Haas, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975) [Emphasis in original.] Fare v. Michael C., ___ U.S. ___, 99 S.Ct. 2560, 2568 (1979).

CONCLUSION

Amicus curiae asks this Court to grant the petition for certiorari filed by the Attorney General of the State of Colorado so as to ensure that federal constitutional law is fairly and correctly applied by the Colorado Supreme Court.

Respectfully submitted March 18, 1981.

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IN THE SUPREME COURT

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THE PEOPLE OF THE STATE OF COLORADO, Petitioners,	)	ENTRY OF APPEARANCE
vs.	)	
ROBERT CHAVEZ, Respondent.	)	

DALE TOOLEY and BROOKE WUNNICKE enter their respective appearance as counsel and amicus curiae on behalf of the People of the State of Colorado.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 18th day of March, 1981, I placed in the United States mail, postage prepaid and properly sealed and addressed, a copy of the foregoing Amicus Curiae brief, to:

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